Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1251

LOUIE L. WAINWRIGHT,
Secretary, Department of
Offender Rehabilitation,
State of Florida, and
CHARLES J. SCRIVEN,
Chairman, Florida Parole
and Probation Commission,

Petitioners,

vs.

DAVID P. DEMAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT STATE OF FLORIDA

AND APPENDIX

ROBERT L. SHEVIN
ATTORNEY GENERAL

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In The

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LOUIE L. WAINWRIGHT,
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PETITION FOR WRIT OF CERTIORARI
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STATE OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of the State of Florida, not yet reported, appears in the appendix hereto as "A1-6". Since that opinion is

predicated on a prior opinion of that court, viz: *Means v. Wainwright*, 299 So. 2d 577 (Fla. 1974), the *Means* opinion is also included in the appendix hereto as "A7-14".

JURISDICTION

The Supreme Court of Florida entered its judgment on November 30, 1977. It denied a timely petition for rehearing on Febraury 22, 1978, (A-15) and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

WHETHER THE DUE PROCESS PROTECTIONS OF *Morrisey v. Brewer*, 408 U.S. 971 (1972), ARE

APPLICABLE TO RESCISSIONS OF UNEXECUTED GRANTS OF PAROLE.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, Section 1, Constitution of the United States, which provides, inter alia; that no state shall ". . . deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

Respondent, David P. Demar, had been convicted in the State of Florida of the offenses of breaking and entering a dwelling with intent to commit a misdemeanor and of grand larceny. On July 19, 1976, he was sentenced to two concurrent terms of six months to two years. On May 30, 1977, Demar was

granted parole by the Florida Parole and Probation Commission, ". . . effective upon the development of a satisfactory plan." Subsequently, Demar was notified that he was to be released on June 21, 1977. On June 1, 1977, after the grant of parole, but before the release date, a disciplinary report was filed against Demar charging him with conspiracy or attempting to conspire with others to bring marijuana into the prison on May 29, 1977. On June 2, 1977, a copy of the report was delivered to respondent. On June 6, 1977, respondent entered a plea of guilty to the charges made in the disciplinary report. Thereafter, by order dated June 8, 1977, the Florida Parole and Probation Commission rescinded respondent's parole. He was so notified by letter dated June 19, 1977.

Respondent Demar filed a petition for writ of habeas corpus in the Supreme Court of Florida contending his unexecuted parole was rescinded without prior notice and hearing. These petitioners conceded that the Florida Parole and Probation Commission had neither given prior notice nor held a hearing concerning the rescission of Demar's unexecuted parole. The Florida Supreme Court granted the writ, holding that the due process protections of *Morrissey v. Brewer*, 408 U.S. 471 (1972), are applicable to rescissions of unexecuted grants of parole. The court gave the Florida Parole and Probation Commission thirty days within which to conduct a parole rescission hearing (A.6).

REASONS FOR GRANTING WRIT

1. THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE DECISIONS OF FEDERAL COURTS OF APPEAL ON A QUESTION INVOLVING FEDERAL LAW.

The Florida Supreme Court based its holding solely on its interpretation of a federal question. It held that *Morrissey v. Brewer, supra*, imposed its due process requirements not only with respect to parole revocation, but also with respect to unexecuted grants of parole. See also *Means v. Wainwright*, 299 So.2d 577 (Fla. 1974) (A. 7-14).

The Fifth Circuit Court of Appeals holds otherwise: *Sexton v. Wise*, 494 F. 2d 1176 (5th Cir. 1974). The question posed in *Sexton* was:

> ". . . whether prison officials must provide notice and a hearing to a prisoner, granted a future date for parole but not yet at liberty, whose parole was summarily rescinded. . . ."
>
> (Text at 1177)

Answering that question in the negative the court said:

> ". . . Until a parole is finalized, no constitutional protections associated with a parole *revocation* embrace the intended parolee."
>
> * * *
>
> "The Board [Parole] never gave up its custody of Sexton and therefore could properly rescind his conditional parole without affording him a full *Morrissey* hearing. The notice of denial was not tantamount to a revocation of parole invoking full constitutional safeguards. To require a full *Morrissey* hearing at this stage would be an extravagant remedy infringing on the discretionary powers of the Board of Parole."
>
> (Text at 1178)

It is clear that had the Fifth Circuit decided the instant case a different result would have been reached. When subsequently presented with the same question, the Fifth Circuit in *McIntosh v. Woodward*, 514 F.2d 95 (5th Cir. 1975), said:

> "Sexton v. Wise, 5 Cir., 1974, 494 F.2d 1176 directly controls this case. McIntosh argues that the somewhat later Supreme Court opinion in Wolff v. McDonnell, 1974, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed. 2d 935, requires us to overrule *Sexton*. We disagree, and hold ourselves bound by the panel decision in *Sexton*."
>
> (Text at 96)

Similarly, the Ninth Circuit has held that the *Morrissey* protections are not available to a rescission of a conditional offer of parole, *Bailleaux v. Cupp*, 535 F.2d 543 (9th Cir. 1976).

Furthermore, the decision of the court below, on this important federal question, conflicts with what this Court said in *Meachum v. Fano*, 427 U.S. 215 (1976); viz: that a grevious loss alone does not suffice to invoke the procedural protections of the fourteenth amendment; the loss must be one which involves a life, liberty or property interest. The Florida Supreme Court ruled, as a matter of federal constitutional law, that the rescission of an unexecuted grant of parole is a grevious loss. It may be, but is an executed grant of parole a protected liberty interest? If it is not, the due process protections of *Morrissey* are not applicable. The Florida Court did not address itself to this question. Its ruling was

based on the mistaken premise that a grevious loss alone suffices to invoke the *Morrissey* due process protections.

This Court has yet to determine whether an executed grant of parole is a protected liberty interest and it is imperative that it do so.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING FEDERAL QUESTIONS.

The federal question involved is a recurring one as can be gleaned from the following cases: *Sexton v. Wise, McIntosh v. Woodward, Bailleaux v. Cupp, supra, Boyd v. Board of Parole,* 541 Pac.2d 1068 (Ore. 1975), *Monohan v. Burdam,* 84 Wash.2d 922, 530 P.2d 1326 (Cal. 1973), *Temple v. Smith,* 548 P.2d 1274 (Utah 1976). The problems

which this question raises will not go away. They will continue to recur until this Court determines whether an unexecuted grant of parole is a protected liberty interest.

The answer is important for another reason. It will go a long way toward answering another recurring question: whether a protected liberty interest is involved in parole eligibility proceedings. If an unexecuted grant of parole is not a protected liberty interest, then, *a fortiori,* neither would there be a protected liberty interest involved in parole eligibility proceedings.

The Fourth Circuit[1] and the

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1 *Bradford v. Weinstein,* 519 F.2d 728 (4th Cir. 1975), cert. granted, *Weinstein v. Bradford,* 421 U.S. 998, later dismissed for mootness, 423 U.S. 147 (1975).

D.C. Circuit[2] have held that parole eligibility proceedings do involve a protected liberty interest; whereas, the Fifth Circuit[3] has held that it does not. In *Bradford v. Weinstein, supra*, the Fourth Circuit held that a possibility of conditional freedom is ". . . an aspect of liberty to which the protection of the due process clause extends." (Text at 731). *Scarpa*, on the other hand, holds that the possibility of conditional freedom does not suffice; there must be a right to freedom.

---

2 *Childs v. United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974).

3 *Scarpa v. United States Board of Parole*, 477 F.2d 278 (5th Cir. 1973), cert. granted and remanded for consideration on questions of mootness, 414 U.S. 809 (1973).

Even should Demar be entitled to a hearing on the rescission of his unexecuted grant of parole, he did in fact have a disciplinary hearing. Under these circumstances Demar was not entitled to the full panoply of procedures afforded under *Morrissey v. Brewer*. Compare: *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Bradford v. Weinstein* and *Childs v. United States Board of Parole, supra*. Yet contrary to those cases the Florida Supreme Court in deciding this federal question held that he was entitled to a full *Morrissey* hearing.

It is manifest that there is conflict, not only between the Florida Surpeme Court and federal circuit courts of appeal on this important federal question, but that there is conflict among the circuits themselves as to what constitutes a

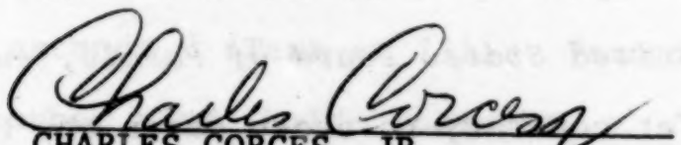
protected liberty interest.

CONCLUSION

For these reasons petitioners respectfully urge this Court to grant certiorari and reverse the holding of the Supreme Court of Florida.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL

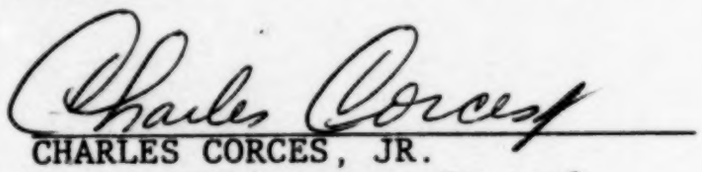


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Counsel for Petitioners

CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Petitioners, and a member of the Bar of the Supreme Court of The United States, hereby certify that on the 8th day of March 1978, I served three copies of the Petition for Writ of Certiorari on Philip J. Padovano, Esquire, Counsel for Respondent, 2950 First Avenue North, P. O. Box 12787, St. Petersburg, Florida 33733, by a duly addressed envelope with postage prepaid.



CHARLES CORCES, JR.
Assistant Attorney General

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1977

DAVID P. DEMAR,

Petitioner,

v. CASE NO. 52,035

LOUIE L. WAINWRIGHT, etc., et al.,

Respondents.

Opinion filed November 30, 1977

Case of Original Jurisdiction - Habeas Corpus

Philip J. Padovano of Ruiz, Padovano & Schrader, St. Petersburg, Florida for Petitioner

Robert L. Shevin, Attorney General; and Davis G. Anderson, Jr., Assistant Attorney General, Tampa, Florida, for Respondent

KARL, J.

This cause is before us on writ of habeas corpus and return thereto. Article

V, Section 3(b)(6), Florida Constitution.

Petitioner was charged, by information dated November 6, 1974, with having broken and entered a building other than a dwelling with the intent to commit a misdemeanor and, by information filed December 18, 1974, with the crime of grand larceny. He entered a plea of guilty to both charges, was convicted and was sentenced to two concurrent terms of six months to two years.

On May 26, 1977, the Florida Parole and Probation Commission entered its order granting parole to petitioner.

By letter dated May 30, 1977, petitioner was notified by the Parole and Probation Commission that he had been granted parole. He was scheduled to be released on parole June 21, 1977.

A disciplinary report dated June 1, 1977, was filed against petitioner by Ron Warren, a correctional counselor, charging

petitioner with conspiracy or attempting to conspire with others to bring marijuana into the prison on May 29, 1977. On June 2, 1977, a copy of this disciplinary report was delivered to petitioner. Petitioner admitted, in a signed statement, that he assisted a resident in bringing the contraband into the prison. The disciplinary committee accepted petitioner's plea of guilty and found him guilty as charged by his own admission.

Thereafter, the Florida Parole and Probation Commission, by order dated June 8, 1977, rescinded petitioner's parole. By letter dated June 14, 1977, petitioner was notified that the Commission had rescinded his parole.

Petitioner, in his petition for writ of habeas corpus, alleges that his parole was rescinded without prior notice and an adjudicatory hearing, that he was not present

during any consideration of the rescission of his parole and that at no time was he offered the opportunity to present evidence, cross-examine adverse witnesses, be represented by counsel or obtain a transcript of the parole recission determination.

This Court issued the writ, and return has been filed by respondents. In their return, respondents concede that petitioner did not have a hearing as contemplated by this Court's decision in Means v. Wainwright, 299 So.2d 577 (Fla. 1974).

15 C.L 2411

We are here confronted with the identical question that was raised in Means v. Wainwright, supra, that is whether the rescission of petitioner's unexecuted grant of parole without notice and an adjudicatory hearing violated his constitutional rights to procedural due process and equal protection of the law. Therein, this Court determined that with the exception of the

preliminary hearing, the minimal due process requirements enumerated in Morrissey v. Brewer, 408 U.S. 471 (1972), are to be applied in parole rescission proceedings once a person has been notified of his grant of parole, even though such grant has been unexecuted. In Means v. Wainwright, this Court reasoned:

> "Cognizant of the fact that the instant case does not concern parole revocation, we nonetheless find that the rescission of the unexecuted grant of parole inflicted such 'grievous loss' on petitioner that he should have been accorded certain procedural protections prior to such rescission. . . .
>
> . . .
>
> "The Supreme Court of the United States has decided that probationers and parolees are entitled to due process at revocation hearings. In applying this principle as set forth in Gagnon v. Scarpelli, supra [411 U.S. 778 (1973)], and Morrisey v. Brewer, supra, there is no difference relevant to the guarantee of due process between a revocation of parole and a

rescission of parole. In the case sub judice, the Parole and Probation Commission acted without giving petitioner notice or a hearing by which he could have conveyed an excuse or an instance of mitigation which may have affected the deicison for rescission."

We adhere to our decision in Means v. Wainwright, supra, and find it to be controlling sub judice.

Accordingly, the writ of habeas corpus should issue and petitioner should be placed upon parole unless he is afforded a parole rescission hearing consistent with and conforming to the due process requirements set out in Morrissey v. Brewer, supra, within thirty days of the filing of this opinion.

It is so ordered.

OVERTON, C.J., ADKINS, BOYD and ENGLAND, JJ., Concur

MEANS v. WAINWRIGHT

Cite as, Fla., 299 So.2d 577

Willie J. MEANS, Petitioner,

v.

Louie L. WAINWRIGHT, Director, Division of Corrections, State of Florida, et al., Respondents.

No. 45223.

Supreme Court of Florida.

July 10, 1974.

Rehearing Denied Sept. 24, 1974.

Prisoner petitioned for habeas corpus to review rescission, without a hearing, of an unexecuted grant o parole. The Supreme Court, Adkins, C. J., held that the rescission of the unexecuted grant for the prisoner's parole inflicted such a grievous loss on the prisoner that he should have been accorded a due process hearing prior to the rescission.

Order in accordance with opinion.

1. Constitutional Law *key* 272

Summary rescission of unexecuted grant of parole caused a "grievous loss," as great as the revocation of a parolee's or probationer's conditional liberty and the

prisoner should have been accorded due process procedural protections. U.S.C.A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law *key* 272

With the exception of the preliminary hearing, the minimal requirements of due process enumerated in the United States Supreme Court case of Morrissey v. Brewer are to be applied in parole rescission proceedings once a person has been notified of his grant of parole, even though such grant is unexecuted. U.S.C.A.Const. Amend. 14.

299 So.2d—37
Fla.Cases 298-299 So.2d—34

Michael R. Manister and Ann Yalman of Florida Rural Legal Services, Inc., Immokalee, for petitioner.

Robert L. Shevin, Atty. Gen., and Wallace E. Allbritton, Asst. Atty. Gen., for respondents.

ADKINS, Chief Justice.

This cause is before us on writ of habeas corpus and return thereto. Fla.Const., art. V, §3(b)(6),F.S.A.

The petitioner is a prisoner in the DeSoto Correctional Institution and was

granted parole on October 4, 1973. By letter dated October 15, 1973, the Commission notified the petitioner that his parole had been granted and that he was to be released from prison on October 23, 1973. Although his parole agreement concerning the terms and conditions of his parole was formulated on October 19, 1973, the petitioner actually never signed the certificate of parole. On October 16, 1973, the Commission rescinded his parole because of a disciplinary report of October 3, 1973. This report stated that petitioner had been found guilty at a disciplinary hearing of violating Furlough Agreement No. 3, which states, "I will refrain from consuming any alcoholic beverages."

Petitioner alleges that his parole was rescinded without being afforded prior notice and an adjudicatory hearing. Petitioner states that he was not present during any consideration of the rescission of his parole, and that at no time was he offered the opportunity to present evidence, cross-examine adverse witnesses, be represented by counsel, or obtain the transcript of the parole rescission determination. Petitioner submits that such rescission of his parole violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

The question we are confronted with is whether the rescission of petitioner's *unexecuted* grant of parole without notice and an adjudicatory hearing violated his constitutional rights to procedural due process and equal protection of the law.

In their return to our issuance of the alternative writ, respondents submit that, since petitioner was never per se granted parole in that the parole agreement was never executed by signature of the petitioner, it was not constitutionally impermissible to rescind such unexecuted grant of parole without affording petitioner notice of its intention and a hearing. Respondents rely heavily on the case of Koptik v. Chappell, 116 U.S.App.D.C. 122, 321 F.2d 388 (1963), and the cases cited therein. However, these cases were rendered prior to the recent pronouncements of the United States Supreme Court on this subject.

The landmark decisions of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L. Ed.2d 484 (1972); and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), laid down the rudimentary constitutional protections the United States Supreme Court felt should be afforded the parolee and probationer. In *Morrissey* the Court held that the "minimal requirements of due process" in final parole revocation proceedings include

(a) written notice of the claimed violations of parole;

(b) disclosure to the parolee of evidence against him;

(c) opportunity to be heard in person and to present witnesses and documentary evidence;

(d) the right to confront and

cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);

(e) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

In *Gagnon* the Court extended the "minimal due process requirements" set forth in *Morrissey* to probation revocation proceedings. The Court found that there was no difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation.

We are, naturally, bound by the Supreme Court's determinations in *Morrissey* and *Gagnon* to the extent that they establish minimal due process requirements in parole and probation revocation proceedings, and we have so acknowledged in the cases of Bernhardt v. State, 288 So.2d 490 (Fla. 1974), and most recently in Dees v. State, Fla., 295 So.2d 296, opinion filed May 22, 1974. In the instant case, although we are not confronted with a revocation of parole, but rather with the rescission of an unexecuted grant of parole, we cannot distinguish such proceedings in principle insofar as the demands of due process are concerned. Respondents strongly emphasized the fact that petitioner did not sign the

parole certificate. Consequently, respondents submit that the lack of such signature and the failure to "fully" execute the parole agreement should necessitate the denial to petitioner of minimal requirements of due process in such rescission. We cannot agree.

[1] The Supreme Court, in considering the applicability of due process standards to parole revocations, declared that procedural protections are due when "an individual will be 'condemned to suffer grievous loss'." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972). Cognizant of the fact that the instant case does not concern parole revocation, we nonetheless find that the rescission of the unexecuted grant of parole inflicted such "grievous loss" on petitioner that he should have been accorded certain procedural protections prior to such rescission. Petitioner was notified by letter dated October 15, 1973, that he had been granted parole effective October 23, 1973. By letter dated October 16, 1973, petitioner was told that his grant of parole was rescinded because of a prior disciplinary report. We feel that the consequences of this summary deprivation of petitioner's prior grant of conditional liberty was a "grievous loss," as great as the revocation of a parolee's or a probationer's conditional liberty.

The California Supreme Court case of In re Prewitt, 8 Cal.3d 470, 105 Cal.Rptr. 318, 503 P.2d 1326 (1972), is of special significance. The Court concluded that the minimum due process requirements of *Morrissey*, with the exception of the preliminary hearing, are constitutionally required for parole rescission hearings. In so holding, the Court recognized that the "grievous loss" suffered by the person whose parole is revoked is no different that the "grievous loss" suffered by the person whose unexecuted grant of parole is rescinded. The court stated:

> "Although the proceedings of which petitioner complains were not for revocation of parole but for rescission of an *unexecuted* grant of parole, *we can perceive no significant distinction between the deprivation of the right to conditional liberty enjoyed by a parolee after release and the deprivation of the right to achieve such liberty after a grant thereof but before the dated fixed for release.* In either event the parolee has been deprived of a valuable if limited right to be free . . . and the same or substantially the same protection must be accorded him in effecting that deprivation." (Emphasis ours.) 105 Cal.Rptr. 318, 322, 503 P.2d 1326, 1330.

The Supreme Court of the United States has decided that probationers and parolees are entitled to due process at revocation hearings. In applying this principle as set forth in Gagnon v. Scarpelli, *supra*, and Morrissey v. Brewer, *supra*, there is no difference relevant to the guarantee of due process between a revocation of parole and a rescission of parole. In the case *sub judice*, the Parole and Probation Commission acted without giving petitioner notice or a hearing by which he could have conveyed an excuse or an instance of mitigation which may have affected the decision for rescission.

[2] We hold that, with the exception of the preliminary hearing, the minimal requirements of due process enumerated in the case of Morrissey v. Brewer, *supra*, are to be applied in parole rescission proceedings once a person has been notified of his grant of parole, even though such grant has been unexecuted.

The writ of habeas corpus should issue. The Petitioner should be placed upon parole unless he is afforded a parole rescission hearing consistent and conforming to the due process mandate as outlined in Morrissey v. Brewer, *supra*, within thirty (30) days of the filing of this opinion.

It is so ordered.

ROBERTS, ERVIN, BOYD and McCAIN, JJ., concur.

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 22, 1978

DAVID P. DEMAR, **
Petitioner, **
vs. ** CASE NO. 52,035
LOUIE L. WAINWRIGHT, etc., et al., **
Respondents. **
**
**

On consideration of the petition for rehearing filed by counsel for respondents,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

OVERTON, C.J., BOYD, ENGLAND and KARL, JJ., Concur

ADKINS, J., Dissents

ORDERED that the Motion for Stay

of Judgment filed by counsel for respondents, is hereby granted and proceedings in this Court are hereby stayed to and including March 24, 1978, to allow respondents to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:
Sid J. White
Clerk Supreme Court

By: /s/ Debbie Causseaux
Deputy Clerk

C
cc: Philip J. Padovano, Esquire of Ruiz, Padovano & Schrader
Charles Corces, Jr., Esquire